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No. 1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JERRY M. COHEN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

JERRY M. COHEN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jerry M. Cohen petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on December 18, 1968.

OPINION BELOW

The Opinion of the Court of Appeals (App. 1) is not yet officially reported but is unofficially reported at 23 A.F.T.R. 2d par. 69-303, Prentice-Hall, Federal Taxes.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 18, 1968 (App. 2). On January 14, 1969, this Court, Mr. Justice Byron R. White, entered an order granting Petitioner an extension of time until February 16, 1969, within which to file a Petition for Writ of Certiorari. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTION PRESENTED

Petitioner Jerry M. Cohen was convicted of filing fraudulent employment tax returns and failure to file personal income tax returns. The evidence used to convict him was obtained solely from his personal books and records. In order to obtain access to these books a Special Agent of the Internal Revenue Service requested Petitioner to turn them over to a Revenue Agent of the field audit group who, he said, was making an audit to determine if any tax liability were owing. In fact, the case had already been assigned to the Special Agent (Criminal Investigator) and the books nominally procured by the Revenue Agent for his "audit" were instead used by the Special Agent to prepare a criminal prosecution. The Special Agent obtained Petitioner's books and records via the Revenue Agent and also obtained critical oral admissions from Petitioner prior to offering any warning to Petitioner regarding the criminal nature of the investigation or his rights as a criminal suspect.

The question presented is: Whether evidence to convict for federal tax violations can be obtained by a Special Agent under the guise that the purpose for

obtaining the records was to have a Revenue Agent conduct an audit when the real purpose for obtaining the records was the Special Agent's criminal investigation, and whether Petitioner was, under the circumstances, required to be warned of his rights as a criminal suspect.

STATEMENT

1. Proceedings Below

Petitioner waived jury trial and a trial to the Court was held on January 2, 1968. On January 18, 1968 the Court found Petitioner guilty of all eleven counts of the indictment. Petitioner was sentenced under all counts to a consecutive total of three years imprisonment and a cumulative total fine of $5,000.

Prior to trial Petitioner had moved to suppress certain evidence and a hearing was held and testimony was taken in support of his Motion on May 19, 1967. The Motion was overruled.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit which affirmed the Judgment of conviction of the District Count on December 18, 1968.

2. The Evidence Obtained by the Special Agent

On September 9, 1963 Special Agent Carl Heinz, who had been with the Intelligence Division of the Internal Revenue Service for 22 years, visited Petitioner's place of business in the company of a field

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[1] The designation "M." refers to the transcript of the hearing on Petitioner's Motion to Suppress. The designation "Tr." refers to the transcript of the trial.

audit Revenue Agent, Edwin L. Reising (M.17-19).[1] At this meeting Petitioner was alone with the two agents (M.2). Prior to this meeting the Internal Revenue Service had determined that Petitioner had not filed income tax returns for the years in question and Petitioner's case had already been referred to and accepted by the Intelligence Division of the Internal Revenue Service and had been assigned to Special Agent Heinz "as a criminal investigator" (M.6,7,37).

Petitioner's business was not incorporated but was operated as a sole proprietorship (M.16-17). In order to obtain Petitioner's books and records Special Agent Heinz told Petitioner at the September 9 interrogation that Revenue Agent Reising needed them to conduct an "audit" of Petitioner's tax liability "if any" (M.6; Tr. 20,49,50).

Special Agent Heinz and Revenue Agent Reising offered their Internal Revenue Service credentials to Petitioner at this meeting but did not explain that a Special Agent is a criminal investigator and did not advise Petitioner of his right to refuse to turn over his records or to refuse to answer interrogation (M.5; Tr. 38). He agreed to turn over the requested books and records to Revenue Agent Reising for an audit (M.7). In response to questions by Special Agent Heinz he admitted that he had not filed income tax returns for the years 1960, 1961 and 1962 (M.5; Tr. 38).

On September 26, 1963 Special Agent Heinz and Revenue Agent Reising revisted Petitioner's place of business and obtained Petitioner's sales ledger or journal and check stubs containing gross sales figures for the years 1960, 1961 and 1962 as well as the payroll records for these periods (M.8; Tr. 21, Tr. 39-41). It

was not until the fourth[2] interrogation of Petitioner, on June 3, 1964, that Special Agent Heinz gave any form of warning to Petitioner. At that meeting he asked why Petitioner had not filed returns and told him that he did not have to answer because it might involve his constitutional rights (Tr. 24).

Prior to obtaining Petitioner's records, Special Agent Heinz had not obtained any evidence that Petitioner had received $600 of taxable income in each of the years in issue which gives rise to the obligation to file a return. This evidence as well as evidence of a tax tax liability in each of those years used to show willfulness was obtained through these and certain additional records obtained from Petitioner by theSpecial Agent at a later date (Tr. 96-100).

On several additional occasions Special Agent Heinz and Revenue Agent Reising visited Petitioner and obtained records and statements from him (Tr. 42, 46, 47, 31, 51). On each of these occasions the receipt for the records was signed by Revenue Agent Reising (M.14, 15). However, on January 29, 1965 a requisition was made to obtain from Internal Revenue files Petitioner's employment tax returns for the years in issue. This purely internal requisition was signed by Special Agent Heinz (Tr. 99).

3. Interrogation in the Federal Building

On September 8, 1964, February 8, 1965, March 16, 1965, August 10, 1965, September 16, 1965, and April 6, 1966 Petitioner came to the Federal Building and fur-

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[2] The Court of Appeals Opinion inaccurately states that such a warning was given at the second interrogation (App. 1, p. 3). Meetings were held on September 9, 1963, September 26, 1963 and March 30, 1964, prior to the June 3, 1964 meeting at which the warning was given (Tr. 37, 39, 42, 46).

nished statements and additional records to Special Agent Heinz. (Tr. 30, 31, 42, 46, 47, 51, 91).

No warnings at all were given Petitioner at the September 8, 1964, February 8, 1965, and March 16, 1965 meetings (Tr. 46).

At the August 10, 1965 meeting Special Agent Heinz advised Petitioner that he was not obligated to make any statement that might incriminate him. At this meeting Petitioner admitted that he understated amounts on his employment tax returns according to what he could pay (Tr. 30).

Petitioner was subjected to interrogation under oath in the Federal Building in the presence of acting supervisory Special Agent McGuire and was then advised for the first time that he had been the subject of a criminal investigation and that criminal prosecution had been recommended. Prior to this interrogation Petitioner had been advised by letter that he could bring an attorney (Tr. 32, 51, 91-94). At this interrogation Petitioner stated that his failure to file was due to carelessness and that the employment tax returns were understated in accordance with what he could pay. (Tr. 93-94).

4. The Court of Appeals Decision

The Court of Appeals held that "Internal Revenue Service Agents, Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights (App. 2, p. 11). The Court then made the following statement (App. 2, p. 11).

> "We also reemphasize the views that we expressed in *Whit* that disclosures to Internal Revenue

> Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud or mispresentations."

Despite this reference to the basic principle on which this Petition is based, the Court of Appeals misunderstood the text and the import of the Special Agent's misrepresentations. The Court recited the following inaccurate summary of the Agents' testimony (App. 2, p. 2):

> "The Special Agent then told the defendant that a Revenue Agent had been assigned to 'examine his income tax liability, if any,' and that the Revenue Agent would make the tax examination, and that he, *the Special Agent,* would conduct an audit." [Emphasis supplied].

This summary is contrary to the testimony, contrary to Internal Revenue practices, and contrary to both Petitioner's and Respondent's version of this testimony. (See Brief of Appellant, p. 3; Brief for the Appellee, p. 9). The Special Agent testified that Revenue Agent Reising had been assigned to "examine his income tax liability, if any" (Tr. 20) and "then he'd conduct the audit." (Tr. 49-50). The Court thought that the "he" referred to was Heinz, overlooking that it was Heinz who was then testifying and who had used the word referring to Reising.

The Court of Appeals not only mistook the statements made by the Special Agent, but also believed that its incorrect version of this crucial testimony constituted a true statement by the Agent.

The Court noted with respect to Petitioner's admission on September 9, 1963, that he had not filed returns for the years in issue that "This was the first time

that the Special Agent knew that no returns had been filed." (App. 2, p. 2).

Yet the Special Agent had testified that prior to September 9 an investigation had revealed that this St. Louis resident had filed no tax returns in St. Louis, and the case had already been referred to and accepted by the Intelligence Division and assigned to the Special Agent "as a criminal investigator."

The Court of Appeals' belief in the truth of the statement that a Special Agent of the Internal Revenue Service was seeking records in order to conduct an audit not only is contrary to the Special Agent's own testimony that he was acting as a "criminal investigator," but it is contrary to his very title as disclosed by the Revenue Agent's manual—"Special Agent (Criminal Investigator)." See *United States* v. *Sclafani,* 265 F.2d 408, 414 (C.A. 2d 1959), certiorari denied, 360 U.S. 918 (1960).

The same Official Manual discloses that in an Intelligence Division and Audit Division joint investigation such as this, the Internal Revenue Service looks to the Special Agent solely for criminal investigation and to assemble proof to establish a charge. See *United States* v. *Wolrich,* 119 F.Supp. 538 (S.D.N.Y. 1954).

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, settled by this Court—whether Special Agents of the Intelligence Division may misrepresent to a suspect that his personal records are sought for the use of a Revenue Agent in conducting a customary audit to determine tax liability when the real purpose for obtaining the

records is to enable the Special Agent to conduct a criminal investigation. The issue is additionally of great importance in the administration of such investigations and is currently the subject of a serious and growing conflict between District Courts and Courts of Appeals.

The crucial importance of the Special Agent's misstatements is that when they were made, he had not yet obtained any evidence that Petitioner had received taxable income in the statutory amount in the years he was investigating. The Special Agent was not entitled to use compulsory process, such as an administrative summons, to obtain these records since they were sought for criminal prosecution. *Reisman* v. *Caplin,* 375 U.S. 440 (1964); *United States* v. *Cohen,* 250 F.Supp. 472 (D.C. D.O. 1966).

Therefore, the Special Agent misrepresented the purpose for which the records were sought in order to keep Petitioner ignorant of the criminal nature of the investigation, for if he did not obtain the records from Petitioner, his investigation would have to be expanded and third party sources would have to be explored.

The Court of Appeals appears to have assumed—despite extensive brief and argument by Petitioner and Respondent on this subject—that Petitioner's records were genuinely sought to conduct a routine audit.

Yet these statements were palpably false and intended to mislead Petitioner. He claimed that the records were sought by Revenue Agent Reising. However, Special Agent Heinz was then conducting a criminal investigation, and it was he who needed the records since he had not yet completed his investigation or

made his recommendation. Reising testified he was merely assisting Heinz, who was a criminal investigator. (Tr. 95).

Special Agent Heinz also claimed that the Revenue Agent was conducting an "audit." But once a case is accepted for field investigation by the Intelligence Division any audit, even if one had started, is suspended[3]. In the case at bar, no "audit" had even begun.[4]

Numerous Courts of Appeals have held that records obtained during an examination honestly begun as a civil audit need not be excluded because the statement of the agent that the records were desired for an audit was not amended when he later found evidence of fraud, suspended the audit and referred the case to the Intelligence Division. *United States* v. *Frank,* 255 F.2d 284 (C.A. 3d 1957), certiorari denied, 355 U.S. 819 (1958); *United States* v. *Sclafani, supra; Turner* v. *United States,* 222 F.2d 926 (C.A. 4th 1955), certiorari denied, 350 U.S. 831 (1956).

The Court of Appeals decision in the case at bar stands alone for the proposition that records obtained

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[3] See *United States* v. *Dickerson,* decided October 25, 1968, not yet officially reported, 69-1 U.S.T.C. par. 9174, p. 83, 802 (N.D. Ill.) where, after the auditing agent was told defendant had not filed, he referred the case to the Intelligence Division and the Court found (p. 83, 803): "At this point, Petrovic had reason to believe that defendant had committed a criminal violation and, *pursuant to Internal Revenue Service regulations, suspended any further activity in his civil investigation* and referred the case to his superiors to determine if the case warranted criminal investigation. (Emphasis supplied.)

[4] As stated in Balter, *Tax Fraud and Evasion* (3rd Edition, 1963), Section 3.3-2, p. 3-15, after the point is reached when a Special Agent comes into a case "from that point on the investigation is in charge of the special agent and the work of the revenue agent is under his direction."

during an examination which is *begun* as a criminal investigation can be used even if the Special Agent misrepresented it as an "audit" by a Revenue Agent.

In reaching this result, the Court of Appeals for the Eighth Circuit necessarily rejected the following thesis:

> "(T)he law distinguishes between failure on the part of a government investigator to disclose the purpose of his investigation at its inception where suspicion of a criminal wrongdoing exists and the discovery of criminal wrongdoing in the course of a routine investigation. (*Wheeler* v. *United States,* 149 F. Supp. 445, 450 (W.D. Pa. 1957), reversed on other grounds, 256 F. 2d 745 (C.A. 3d, 1958).)

In *Wheeler* the Court held that the agent's statement that he was undertaking a routine tax investigation when, in fact, it was a mere pretext to look for evidence to support a criminal charge (p. 450) "constitutes a fraud and deceit on the taxpayer in violation of his constitutional rights and his right against self-incrimination."

The same view was taken in *United States* v. *Wolrich,* 119 F. Supp. 538 (S.D.N.Y. 1954). In *Wolrich* the Court had initially assumed that the Revenue Agent's statement that he was making a "routine audit" was correct and denied defendant's Motion to Suppress. On rehearing the Court received the Official Manual of the Revenue Agents in evidence and analyzed the nature and purpose of a Joint Investigation by a Special Agent and a Revenue Agent. The Court relied on the Official Manual and stated (p. 529): "From this it appears that a Joint Investigation is one that is initiated when *probable fraud* is indicated." (Emphasis supplied.) The Court vacated its earlier ruling denying the defendant's Motion and set the

case for a hearing to determine whether defendant was defrauded. See in accord *United States* v. *Avila,* 227 F. Supp. 3 (N.D. Calif. 1963) which held for the defendant where the agent pretended to be examining an unaudited year but actually examined an already audited year without first obtaining the statutory letter from the Commissioner permitting a reaudit. See also *United States* v. *Manno,* 118 F. Supp. 511 (N.D. Ill. 1954).

Also, in *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953), modified, 126 F. Supp. 609 (1955), a Special Agent joined in the investigation from the beginning to obtain evidence for criminal prosecution but the examination was described to the defendant as an audit. The Court ruled for defendant. The Court considered the Eighth Circuit's 1950 decision in *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th 1950) which had held for the government and distinguished *Hanson* stating (p. 130):

> The very factors referred to in that opinion as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in this case.
>
> In the instant case we have the very frank testimony of Special Agent Pearson that he had reason to believe that the defendant had been guilty of fraud and that his purpose in making the examination of his papers was to obtain evidence for contemplated criminal prosecution. *With these different circumstances* I am of the opinion that the Court of Appeals for the 8th Circuit would have reached the conclusion that the defendant was entitled to a warning before the information could be said to have been obtained from the de-

> fendant without doing violence to his privilege under the Fifth Amendment. (Emphasis supplied.)

Such circumstances are also present in the case at bar, but the Court of Appeals has mistaken the critical testimony and viewed the case as one where the Agent's statement was true when made with suspicion of a criminal violation only arising later, when in fact the Agent's statement was false when made and, as suggested by the Court in *Guerrina,* the Court of Appeals for the Eighth Circuit should have recognized the distinction and reversed.

This Court in the recent case of *Mathis* v. *United States,* 391 U.S. 1 (1968), a case in which no affirmative misrepresentation was practiced by the agents, held that Internal Revenue Agents must give the plenary warnings required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966) when a suspect is the subject of a criminal investigation which is in the accusatory stage if he is in custody or otherwise deprived of his freedom by the authorities in any significant way.

In the most recent reported decision on the obligation of criminal investigators of the Internal Revenue Service to warn suspects, the Court held that a defendant who was interrogated in the same fashion as Petitioner (but who apparently was not affirmatively misled as was Petitioner) had "his freedom of action curtailed in a very significant way" within the meaning of *Miranda* and *Mathis. United States* v. *Dickerson,* decided October 25, 1968 (not yet officially reported), 69-1 U.S.T.C., par. 9174, p. 83, 802 (N.D. Ill.) at p. 83, 303.

In *Dickerson* the Court cited with approval the law review commentary[5] and authority[6] that warnings are required which has continued to grow since this Court's *Mathis* decision. The Court refused to restrict *Miranda* to the jailhouse because of this Court's holding in *Miranda* (p. 436) that "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The Court held that confinement in a jailhouse setting was the "obvious situation" but that defendant's freedom was significantly curtailed by the agents questioning, the absence of counsel, and the absence of sufficient warnings. (69-1 U.S.T.C., p. 83, 804-5).

Dickerson and the many other District Court cases are carefully considered, and masterful analyses of the major administrative and investigative problem posed by the continuing tactics of Special Agents. Those decisions are fully supported by this Court's language in *Miranda* and *Mathis* on which they rely. Their result continues to be supported, despite the contrary appellate authority, by numerous law review writers. And despite its efforts to save past convictions procured by such tactics, the Internal Revenue Service has it-

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[5] Andrews, The Right to Counsel in Criminal Tax Investigations Under *Escobedo* and *Miranda:* The Critical Stage, 53 Iowa L. Rev. 1074 (1968); See also articles cited in footnotes 3 and 8 of App. 2, pp. 2, 10.

[6] *United States* v. *Turzynski,* 268 F.Supp. 847 (N.D. Ill. 1967); *United States* v. *Kingry,* 67-1 U.S.T.C., par. 9262 (N.D. Fla. 1967); *United States* v. *Schoenberg,* 67-1 U.S.T.C., par. 9393 (D. Ariz. 1966); *United States* v. *Gower,* 271 F.Supp. 655 (M.D. Pa. 1967); *United States* v. *Harrison,* 265 F.Supp. 660 (S.D.N.Y. 1967); *United States* v. *Wainwright,* 284 F.Supp. 129 (D. Colo. 1968).

self, at long last, announced intended compliance with much of what is advocated by Petitioner,[7] though it still refuses to require its Special Agents to give the comprehensive *Miranda* warnings unless an arrest is made. Arrest, of course, virtually never occurs.

If this case presented only an opportunity to reconcile the continued conflicting views of the District Courts and the Courts of Appeals on the warning question, or only an opportunity to resolve the administrative ambivalence of the Internal Revenue Service, this Petition should readily be granted. But when these unresolved controversies touch the case of a suspect who was seriously misled in a way which will be repeated as long as present policies continue, consideration of the issue by this Court can wait no longer.

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[7] Internal Revenue Service News Release, IR-949, November 26, 1968:

"* * * At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

"Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

"IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

"A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,181

JERRY M. COHEN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Missouri

[December 18, 1968.]

Before MATTHES, MEHAFFY and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The defendant was indicted in three counts for willful failure to file individual income tax returns for 1960, 1961 and 1962 in violation of § 7203 of the Internal Revenue Code of 1954, and in eight counts for knowingly filing false employer's quarterly tax returns for 1961 and 1962 in violation of § 7201. He was found guilty on all counts and was sentenced.

The question raised here is whether the District Court erred in refusing to exclude evidence obtained from the defendant by Internal Revenue Service Agents—evidence which the defendant contends was secured by misrepresentation and in violation of his constitutional rights under the Fifth (*Miranda*)[1] and Sixth (*Escobedo*)[2] Amendments.

We affirm.

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).
[2] *Escobedo* v. *Illinois*, 378 F. 2d 767 (1964).

A Special Agent,[3] assigned to investigate the defendant's failure to file tax returns, telephoned the defendant on August 19, 1963, and told him he was a Special Agent who investigated irregularities in taxes. He asked the defendant a few questions and requested an appointment.

On September 9, 1963, the Special Agent went to the defendant's office and told him that the St. Louis Office of the Internal Revenue Service had no record of income tax returns filed by the defendant and asked where they had been filed. The defendant replied that he had filed returns in Detroit in 1959, but had not filed returns after that. This was the first time that the Special Agent knew that no returns had been filed. The Special Agent then told the defendant that a Revenue Agent had been assigned to "examine his income tax liability, if any" and that the Revenue Agent would make the tax examination, and that he, the Special Agent, would conduct an audit. The Special Agent also learned, at this meeting, that the defendant was the sole proprietor of the United Heating Service.

The agents visited the defendant's office singly or together on September 26, 1963, June 3, 1964, September 9,

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[3] Revenue Agents undertake routine civil audits in an attempt to ascertain if, in fact, there has been a deficiency. The Revenue Agent, in the normal course, is not searching for evidence of fraud. If, however, the Revenue Agent discovers the possible existence of fraud, the matter is turned over to his superiors who refer the case to the Intelligence Division. The Intelligence Division then determines whether a fraud investigation is warranted. If a decision is made to commence a fraud investigation, a Special Agent is placed in charge. The Special Agent is a trained criminal investigator. His duty is to determine whether the taxpayer has, in fact, committed fraud. Both the Special Agent and Revenue Agent have virtually unreviewable discretion to dismiss the criminal aspects of a case while they are in charge. Duke, *Prosecutions For Attempts To Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 Yale L. J. 1, 34-35 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 Taxes 660, 661-62 (1966).

1964, March 16, 1965, August 10, 1965 and September 16, 1965. On most occasions they obtained records used against the defendant.

It was at the second visit, on June 3, 1964, that the defendant was first advised that he need not answer any questions which tended to incriminate him. He responded to this warning by saying that he understood but saw no reason not to answer. The warning was repeated at an August 10, 1965, meeting at the defendant's office. The defendant again answered the questions put to him by the agents.

On April 6, 1966, the taxpayer went to the Internal Revenue Service office for a formal interview. He did so in response to a letter which told him he could bring an attorney. He was advised for the first time at this meeting that the Special Agent was a criminal investigator. He was also advised for the first time that he had a right to counsel, but was not told that counsel would be provided for him.

On the basis of this record, we are convinced that the defendant's records and statements were not obtained by misrepresentation, fraud or coercion, as those terms were understood pre-*Escobedo* and *Miranda*, and were voluntarily given in the same sense.

While there is District Court authority for the view that Internal Revenue Service Agents have an affirmative duty to inform a taxpayer that he is the subject of a criminal investigation in circumstances comparable to those here,[4] the United States Courts of Appeals have

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[4] *United States* v. *Wheeler*, 149 F. Supp. 445, 450 (W.D. Pa. 1957), *rev'd on other grounds*, 256 F. 2d 745 (3d Cir.), *cert. denied*, 358 U.S. 873 (1958):

> "* * * [T]he law distinguishes between failure on the part of a government investigator to disclose the purpose of his invetsigation at its inception when suspicion of criminal wrong-

uniformly held to the contrary.[5] We follow the latter cases but reiterate our warning in *White* v. *United States*, 395 F.2d 170 (8th Cir. 1968), that agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges.

We turn to the question of whether the failure to give a *Miranda* warning, or a modified version thereof, made the evidence obtained inadmissible.

We indicated by way of dictum in *Frohmann* v. *United States*, 380 F.2d 832 (8th Cir. 1967), and held in *White*, that a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service conducting a pre-custody investigation need not warn a taxpayer of his constitutional rights as enunciated in *Escobedo* and *Miranda*. We did not distinguish in either case between investigations conducted by the Audit Division, usually civil, and those conducted by Special or Intelligence Agents, usually criminal. Nor did we attempt to draw a line between the investigatory or accusatory stage of such investigations.

We are now faced with the question of whether we will apply the dictum in *Frohmann* and the holding in *White*

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doing exists and the discovery of criminal wrongdoing in the course of a routine investigation. * * * "

The former constitutes misrepresentation. *United States* v. *Walrich*, 129 F. Supp. 528 (S.D. N.Y. 1954). Although fraud was suspected from the outset the agents told the defendant that it was a routine examination. The court held that this was a misrepresentation. *United States* v. *Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953), *modified*, 126 F. Supp. 609 (E.D. Pa. 1955).

[5] *United States* v. *Mackiewiez*, 68-2 USTC ¶ 9461 (2d Cir., July 10, 1968), *cert. denied*, 37 U. S. L. Week 3158 (U.S. Oct. 28, 1968); *United States* v. *Sclafani*, 265 F. 2d 408, 414 (2d Cir. 1959), *cert. denied*, 360 U.S. 918 (1960); *United States* v. *Frank*, 245 F. 2d 284, 286 (3d Cir. 1957), *cert. denied*, 355 U.S. 819 (1957). See, *Hanson* v. *United States*, 186 F. 2d 61, 65-66 (8th Cir. 1950)

to pre-custodial inquiries by Special Agents of the Internal Revenue Service, including situations in which the inquiries may have reached the accusatory stage.

District Courts in the Tenth, Fifth, Third and Seventh Circuits have held that warnings are required at the point the investigation reaches the accusatory stage or becomes criminally oriented. They have indicated that this stage is often reached when a Special Agent is assigned to the case.[6] *United States* v. *Turzynski,* 268 F.Supp. 847 (N.D. Ill. 1967), is recognized as the leading case for this point of view.

In *Turzynski,* as a result of a civil investigation, the taxpayer's case was turned over to the criminal division of the Internal Revenue Service. The taxpayer was not informed of this shift of focus and continued to furnish the Special Agent with records and interviews. The taxpayer was given no warning of possible criminal prosecution until the investigation was completed and he was sent a letter inviting him to a formal conference. The letter informed him that he could bring counsel. The taxpayer reported without counsel. The agents, however, refused to continue until the taxpayer retained counsel. The court said:

> "* * * Once a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after

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[6] *United States* v. *Wainwright,* 284 F. Supp. 129 (D. Colo. 1968); *United States* v. *Kingry,* 67-1 USTC ¶ 9262 (N.D. Fla. January 6, 1967); *United States* v. *Gower,* 65-2 USTC ¶ 9752 (M.D. Pa. August 27, 1965). See, Andrews, *The Right To Counsel In Criminal Tax Investigation Under Escobedo And Miranda: The "Critical Stage,"* 53 Iowa L. Rev. 1074, 1111-1116 (1968); Comment, 53 Iowa L. Rev. 957, 962 (1968).

knowingly and voluntarily waiving his constitutional rights and privileges. * * *

* * * * * * * *

"To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes."

Id. at 850-51.

The Court of Appeals, that have considered the matter since *Escobedo,* have held, in a variety of fact situations, that warnings need not be given in pre-custodial interview.[7] The reasoning of Judge Lumbard in *United States*

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[7] FIRST CIRCUIT:
Taglianetti v. *United States,* 68-2 USTC ¶ 9479 (1st Cir. July 18, 1968), *petition for cert. filed,* 37 U.S. L. Week 3081, (U.S. Aug. 28, 1968) (No. 446); *Spinney* v. *United States,* 385 F. 2d 908 (1st Cir. 1967), *cert. denied,* — U.S. —, 19 L. Ed. 2d 981 (1968); *Schlinsky* v. *United States,* 379 F. 2d 735 (1st Cir.), *cert. denied,* 389 U.S. 920 (1967); *Morgan* v. *United States,* 377 F. 2d 507 (1st Cir. 1967).

In each of these cases, the defendant was warned of his right to remain silent and was told that anything he stated could be used against him. In none of them was he advised of his right to counsel or to have counsel appointed for him. The language of the Court in *Spinney* indicates, however, that it would not necessarily require that any of the *Miranda* warnings be given to a taxpayer being interviewed in home or an Internal Revenue Service office.

"* * * [W]here one is legally free, albeit at the risk of unpleasant consequences, to reject the government's invitation to appear and participate in an I.R.S. interview, the requirements enumerated in *Miranda* do not apply. * * *

"'. . . the background of *Miranda* demonstrate sthat it was the product of the Court's concern with the difficulty of pro-

v. *Squeri*, 398 F.2d 785 (2d Cir. 1968), appears to reflect the views (often unexpressed) of the Circuits that have considered the question:

> "* * * [W]e reject the view, adopted by a few district courts in other circuits, that IRS agents must

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> tecting persons in the custody of the police from coercive interrogation tactics carried on in secret. * * * Defendant makes no assertion, nor could he, that he was not free to walk out of the Internal Revenue office at any time. * * * ' "

Spinney v. *United States*, 385 F. 2d at 910.

SECOND CIRCUIT:

United States v. *Marcus*, 68-2 USTC ¶ 9599 (2d Cir. September 20, 1968); *United States* v. *Dawson*, 400 F. 2d 194 (2d Cir. 1968); *United States* v. *Squeri*, 398 F. 2d 785 (2d Cir. 1968); *United States* v. *Mackiewicz*, 68-2 USTC ¶ 9461 (2d Cir. July 10, 1968), *cert. denied*, 37 U. S. L. Week 3158 (U.S. Oct. 28, 1968).

In *Mackiewicz* and *Squeri*, the defendant was warned of his right to remain silent but was not advised of his right to counsel. In *Dawson*, the defendant was warned of his right to remain silent and to have counsel at the first two interviews. At subsequent interviews, no warnings were given and defendant made damaging admissions. In *Marcus*, it is not clear whether or not the defendant was warned of his right to remain silent, but the defendant was not warned of his right to counsel. The Court, in all four cases, went beyond the facts of the particular case and stated that where the defendant was aware he was the subject of a tax investigation and where the interviews were conducted in non-custodial situations, *Miranda* warnings are not required.

FOURTH CIRCUIT:

United States v. *Mancuso*, 378 F. 2d 612 (4th Cir.), *modified*, 387 F. 2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

The defendant was accompanied by his attorney and accountant at two Internal Revenue Service interviews where he made incriminating statements. The defendant was warned he could refuse to answer the questions which could incriminate him, but was not warned of his right to counsel. The Court, rather than base its decision on the narrow ground that counsel was, in fact, present, chose to hold that neither *Miranda* nor *Escobedo* are applicable to a tax investigation where the purpose is to determine

> give the *Miranda* warnings, even though there is no custodial interrogation, if the investigation has reached the accusatory stage. * * * The Fifth Amendment privilege prohibits the government from *compelling* a person to incriminate himself. It was the compulsive aspect of custodial interrogation, and not the strength

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whether or not additional taxes due or a crime has in fact been committed.

FIFTH CIRCUIT:

United States v. *Mancuso*, 378 F. 2d 612 (4th Cir.), *modified*, 387 F. 2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

The defendant was accompanied by his attorney and accountant at two Internal Revenue Service interviews where he made incriminating statements. The defendant was warned he could refuse to answer the questions which could incriminate him, but was not warned of his right to counsel. The Court, rather than base its decision on the narrow ground that counsel was, in fact, present, chose to hold that neither *Miranda* nor *Escobedo* are applicable to a tax investigation where the purpose is to determine whether or not additional taxes due or a crime has in fact been committed.

FIFTH CIRCUIT:

Mathis v. *United States*, 376 F. 2d 595 (5th Cir. 1967), *rev'd*, 391 U.S. 1 (1968).

The defendant was interviewed in connection with a routine audit while he was confined in the Florida State Penitentiary on an unrelated conviction. No warnings were given and the Circuit Court affirmed on the basis that no warnings were required where the agent was conducting a routine audit even though there was a possibility that fraud would be uncovered. The Supreme Court reversed and held the interview must be suppressed as it was the product of an *in custody* interrogation.

SIXTH CIRCUIT:

United States v. *Maius*, 378 F. 2d 716 (6th Cir.), cert. denied, 389 U.S. 905 (1967).

The defendant was warned that he had the right to remain silent but not that he had the right to counsel. The Court expressed grave reservations as to its holding:

> "* * * A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are

or extent of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning. We believe that the presence or

few who have the toughness of fibre and the technical knowledbe of their rights, who would decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial."

Id. at 719.

SEVENTH CIRCUIT:

United States v. *Mansfield*, 381 F. 2d 961 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967).

The defendant was warned at the initial interview that there was a possibility of criminal prosecution and that he could remain silent and refuse to produce his records. He was not warned of his right to counsel. No further warnings were given at subsequent interviews. The Court held that the tactical decision not to give further warnings did not render inadmissible records obtained at subsequent interviews.

NINTH CIRCUIT:

Selinger v. *Bigler*, 377 F. 2d 542 (9th Cir.) (Per Curiam), *cert. denied*, 389 U.S. 904 (1967); *Rickey* v. *United States*, 360 F. 2d 32 (9th Cir.), *cert. denied*, 385 U.S. 835 (1966); *Kohatsu* v. *United States*, 351 F. 2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966).

All three of these cases arose post-*Escobedo* but pre-*Miranda*. In *Kohatsu*, the defendant was not warned of his right to retain or have counsel appointed, but was warned of his right to remain silent and not to produce any records. The warning, however, was given by a Special Agent after the defendant had already made incriminating statements and turned over incriminating records to a Revenue Agent. The Court held that *Escobedo* was not applicable as this was an investigation to determine whether a crime had been committed in fact. Revenue Agents are not required to inform the taxpayer of the shift to a criminal investigation where a routine investigation develops evidence of fraud because it is inherent in the investigation that the agents will pursue such evidence. The other two cases relied on this reasoning.

absence of compelling pressures, rather than the stage to which the government's investigation has developed, determines whether the *Miranda* requirements apply to any particular instance of questioning."

Id. at 790.

On November 26, 1968, the Internal Revenue Service announced a revised procedure for advising a taxpayer of his rights during an investigation conducted by a Special Agent of the Internal Revenue Service, Intelligence Division.

"* * * At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he say may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

"Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

"IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

"A person in custody also must be told that he has the right to consult or have present his own counsel before making at statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U. S. Commissioner."

IRS News Release IR-949, November 26, 1968.

The procedures outlined in the instructions are a step forward in tax administration and will be among the

factors considered by this Court in determining whether the nature of an investigation has been misrepresented. They fall short, however, of extending to the taxpayer the protections set forth in *Escobedo* and *Miranda*.

The administration of the new Internal Revenue Service procedure will raise practical problems. In some instances, the Revenue Agents will have obtained the evidence necessary to obtain a conviction before referral; in others, Revenue Agents might be encouraged to expand their inquiries. Furthermore, a determination as to when the right to warnings attach should not depend on the title and function of the official investigator. *United States* v. *Mathis*, 391 U.S. 1 (1968); *United States* v. *Mackiewicz*, 68-2 USTC ¶9461 (2d Cir. July 10, 1968), *cert. denied*, 37 U.S. L. Week 3158 (U.S. Oct. 28, 1968); Note, 33 U. Chi. L. Rev. 134, 147-48 (1965).

To meet these problems, Law Review commentary recommends that warnings be optional with the Internal Revenue Service, depending on whether there is a desire to preserve the right to use any evidence obtained in a criminal prosecution If it had this desire, full warnings would be required.[8]

If a taxpayer is entitled to be warned of his Fifth and Sixth Amendment rights in a non-custodial tax investigation, the Law Review recommendations would be meritorious. While the suggested procedure would impose additional administrative tasks,[9] it would be fair to the

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[8] *Duke, supra* note 3, at 39; *Hewitt, supra* note 3, at 697; Lipton, *Constitutional Rights in Criminal Tax Investigation*, 53 A.B.A.J. 517, 521 (1967); Note, 33 U. Chi. L. Rev. 134, 147-48 (1965).

[9] "To inject the full *Miranda* warning at this stage of the proceedings would merely clutter an already difficult administrative task." *United States* v. *Mackiewicz, supra*. See, *Kohatsu* v. *United States, supra; United States* v. *Sclafani, supra*.

taxpayer and susceptible of review. We do not require it, however, because we do not believe that the taxpayer is so entitled.

To summarize, we hold that the Internal Revenue Service Agents, Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights.

We also reemphasize the views that we expressed in *White* that disclosures to Internal Revenue Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud or misrepresentations.

Affirmed.

A true copy.

Attest:

Clerk. U. S. Court of Appeals, Eighth Circuit.

APPENDIX 2

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1968

No. 19,181

JERRY M. COHEN, *Appellant,*

v.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court. that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Jerry M. Cohen, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

December 18, 1968.

APPENDIX 3

SUPREME COURT OF THE UNITED STATES

No. ....., OCTOBER TERM, 1968

JERRY M. COHEN, *Petitioner,*

v.

UNITED STATES

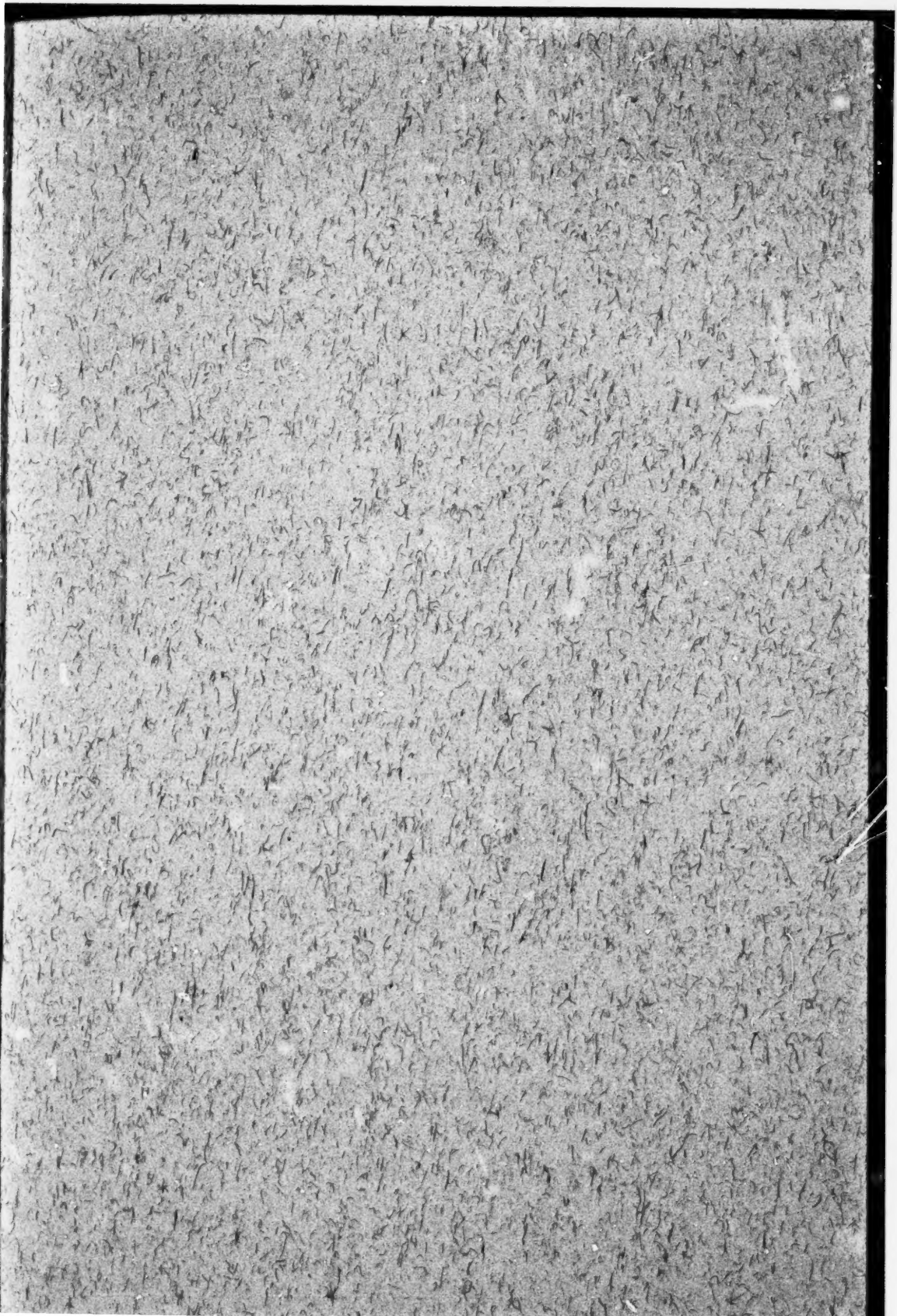
Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 16, 1969.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 13th
day of January, 1969.



In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1043

JERRY M. COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-12a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1968. (Pet. 13a.) On January 13, 1969, Mr. Justice White granted petitioner an extension of time until February 16, 1969, within which to file a petition for certiorari (Pet. 14a). The peti-

tion for a writ of certiorari was filed on February 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence used at petitioner's trial for tax evasion and willful failure to file returns was obtained from him in violation of his constitutional rights because the investigating special agent of the Internal Revenue Service did not describe his inquiries as a criminal investigation and did not advise petitioner of his rights under the Fifth and Sixth Amendments.

STATEMENT

After a jury-waived trial petitioner was convicted on three counts of willful failure to file individual income tax returns for 1960, 1961, and 1962, in violation of Section 7203 of the Internal Revenue Code of 1954, and eight counts of knowingly filing false employer's quarterly tax returns for 1961 and 1962 in violation of Section 7201 of the Code. (II-Tr. 131-136; Pet. 1a).[1] The court of appeals affirmed.

The sole question presented is whether the district court erred in failing to exclude evidence obtained from petitioner by Internal Revenue Service agents, either because it was obtained by deceit or because sufficient advice concerning constitutional rights was not given.

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[1] "I-Tr." will be used to refer the transcript of proceedings on the motion to suppress evidence, and "II-Tr." to refer to the transcript of trial proceedings.

Special Agent Heinz testified [2] that his first contact with petitioner was by telephone on August 19, 1963. He told petitioner that he was a special agent with the Intelligence Division, that it was his duty to check "irregularities" in taxes, and that the Internal Revenue office in St. Louis, Missouri, had no records showing that he had filed income tax returns. He asked petitioner in what district he had filed his returns. Petitioner did not answer the question, but said that he was going out of town and that he would see Heinz on September 9, 1963. (I-Tr. 1-3, 10-11; II-Tr. 16-17, 37-38.)

On September 9, 1963, Heinz and agent Reising of the Audit Division went to petitioner's office by appointment. They produced their credentials for petitioner and again told him that the St. Louis office had no record of his having filed personal income tax returns and that they wanted to know where such returns had been filed. Petitioner replied that he had previously filed returns in Detroit but had failed to file returns for 1960, 1961, or 1962. (I-Tr. 4-5; II-Tr. 19-20.) Until then, Heinz did not know that petitioner had not filed income tax returns for the years in question anywhere, and he did not know whether any income tax was due, whether there was any unreported income, or that false quarterly employer's tax returns (Form 941) had been filed by petitioner.

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[2] Petitioner did not testify, either at the trial or at a pretrial hearing on his motion to suppress evidence; the only testimony relevant to the issue presented was that given by the two Internal Revenue Service agents involved.

(I-Tr. 24-27; II-Tr. 19). Heinz told petitioner that Reising had been assigned to make an audit of petitioner's tax liability, and Reising then discussed with petitioner the records which would be needed for an audit. (I-Tr. 6-7; II-Tr. 49.)

At the first meeting petitioner produced no records but said that he would do so. On September 26, 1963, petitioner turned over to the agents his sales ledger and some check stubs. (I-Tr. 7-8; II-Tr. 21-22.) These records showed gross receipts and wages paid. (II-Tr. 40-41.) On March 30, 1964, petitioner turned over more records. (II-Tr. 22-23.) On June 3, 1964, at a meeting at petitioner's office, Heinz asked petitioner why he had not filed income tax returns, first warning petitioner that he was not required to reply if the answer might incriminate him. Petitioner replied that he understood and that he saw no objection to answering, and stated that when he started in business he did not have enough money to pay the taxes "and later on he just got careless and continued not to file". (II-Tr. 24-25.)

Petitioner brought more records to the agents, at their office, in September, 1964, and in February, March, and September, 1965. (II-Tr. 25-31.)

On January 29, 1965, Heinz requisitioned from Internal Revenue Service files petitioner's quarterly employer's returns (Form 941). (II-Tr. 99.) Subsequently, on August 10, 1965, at the Internal Revenue Service office, Heinz showed petitioner those returns and asked him where he obtained the figures for them, first warning petitioner again of his privilege against self-incrimination and telling him that there were

discrepancies. (I-Tr. 18-19; II-Tr. 28-30.) Petitioner replied that at first he could pay only a small amount and reported whatever he could afford to pay, and that later he continued to do the same thing. (II-Tr. 30.)

After a decision in favor of criminal prosecution had been made by Internal Revenue, a letter was sent to petitioner giving him an opportunity to come in for a conference and advising that he could bring an attorney. Petitioner came without an attorney on April 6, 1966, and was advised only of his privilege against self-incrimination. (I-Tr. 22, 30; II-Tr. 32-35, 51, 92-94.)

ARGUMENT

In substance, petitioner contends (Pet. 8-15) that his disclosures to revenue agents were not made freely or voluntarily (1) because the investigation was represented as an ordinary tax audit and the alleged purpose to gather evidence to prosecute him was not revealed and (2) because he had not been given the warnings prescribed for custodial interrogation in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court of appeals correctly rejected both contentions.

1. The record gives no support to the contentions that petitioner was deceived about the possibility of criminal prosecution, and that the Internal Revenue agents attempted to deceive him.

It is difficult to believe that anyone who had failed to file his income tax returns for three years would not recognize that any audit by Internal Revenue

agents might result in criminal prosecution.[3] Certainly, the telephone call on August 19, 1963, from agent Heinz, who explained that he was a special agent of the Intelligence Division with a duty to investigate "irregularities" in income tax matters, inquiring where petitioner had filed his returns, since the records at St. Louis showed none, was not intended to deceive petitioner concerning the possibility of criminal prosecution. Indeed, petitioner may have sought the delay to September 9, 1963, in order to consider how he should deal with the investigation. At his own office, on the appointed day, petitioner acknowledged that he had filed no returns. (I-Tr. 1-5, 10-11; II-Tr. 16-20, 37-38.) Although petitioner was not told that he could refuse to answer, he obviously had decided that the best tactic was to cooperate rather than to obstruct.

Petitioner attempts to conjure up a picture of deceit by asserting (Pet. 8-9) that Special Agent Heinz, at the September 9 meeting, falsely represented that petitioner's records were "sought for the use of a Revenue Agent in conducting a customary audit to determine tax liability" when allegedly the "real purpose" was to serve a criminal investigation. This is a tortured description of the undisputed facts. In a

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[3] Although petitioner did not testify at trial in a presentence plea, petitioner's counsel told the court (II-Tr. 128): "Several years later when the business started to show some profit, he had not filed a return during the bad years, it was a question of him panicking and afraid he was going to be discovered, and continuing along this line of not filing the return."

joint investigation, the agent from the Audit Division (here, Reising) has the duty of auditing the taxpayer's books. (I-Tr. 34-37.) Heinz correctly told petitioner that agent Reising would make the audit. It is entirely unreal to suppose that an average taxpayer,[4] knowing that he has violated the revenue laws, assumes that an inquiry by a revenue agent, of whatever kind, carries with it any guarantee that civil liability will be the only consequence. See *Turner* v. *United States*, 222 F. 2d 926, 931-932 (C. A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 286 (C. A. 3); *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C. A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Squeri*, 398 F. 2d 785, 788 (C. A. 2).

2. Petitioner also contends that the full *Miranda* warnings should be required in tax investigations. However, the courts of appeals have unanimously rejected the contention that *Miranda* warnings are required in non-custodial and non-coercive tax investigations, and this Court has repeatedly denied certiorari to review the question. See, *e.g.*, *Muse* v. *United States*, 69-1 U.S.T.C., par. 9133 (C. A. 8), certiorari denied, March 3, 1969, No. 951, O.T., 1968; *United States* v. *Squeri*, 398 F. 2d 785 (C. A. 2); *Schlinsky* v. *United States*, 379 F. 2d 735 (C. A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States*, 385

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[4] Taxpayer evidently was not of below-average intelligence, since he was the proprietor of a business having gross receipts of about $180,000 per year (II-Tr. 106, 111-112) and was fully alert to the dangers involved in failing to file returns (II-Tr. 128).

F. 2d 908 (C. A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz*, 401 F. 2d 219 (C. A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso*, 378 F. 2d 612 (C. A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Maius*, 378 F. 2d 716 (C. A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C. A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States*, 380 F. 2d 832 (C. A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States*, 351 F. 2d 898 (C. A. 9), certiorari denied, 384 U.S. 1011. No sufficient reason appears for reaching a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOHN P. BURKE,
JOHN M. BRANT,
Attorneys.

MARCH 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 336125 548